

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
MICHAEL SCORDAMALGIA,

Complainant

v.

DOCKET NO. 10-BEM-00221

CITY OF NEWTON,

Respondent

Appearances: Olinda R. Marshall, Esq. for Complainant
Donnalyn B. Lynch Kahn, Esq. and Maura E. O'Keefe, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 19, 2010, Complainant, Michael Scordamalgia, filed a complaint with this Commission alleging that his former employer, Respondent, City of Newton, discriminated against him on the basis of his disability when it terminated his employment as a motor equipment repairman (mechanic) in August of 2009, in violation of M.G.L. c. 151B, § 4(16). The Investigating Commissioner found probable cause to credit the allegations of the complaint and efforts at conciliation were unsuccessful. A public hearing was held before the undersigned hearing officer on February 23, 24, and 26, 2015. The following witnesses testified on behalf of Complainant: Michael Scordamalgia and Douglas Bartley, the former president of the Newton

Municipal Employees Association (Complainant's Union). The following witnesses testified on behalf of Respondent: Lori Burke, the City's former Safety and Health Officer and Workers' Compensation Manager; Delores Hamilton, the City's former Director of Human Services, and Ron Mahan, the City's Fleet Manager within the Department of Public Works. The parties introduced fifty-six exhibits into evidence.

Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant was employed by the City of Newton as a mechanic in its Public Works Department (DPW) from 1987 until the date of his termination on August 21, 2009. During his employment with the Respondent, Complainant was a member of the Newton Municipal Employees Union and its predecessor, LIUNA, Local 544.

2. Respondent, City of Newton is a municipality within the Commonwealth of Massachusetts and is an employer within the meaning of G.L. c. 151B.

3. From 1987 until January of 2002, Complainant performed all the job functions of a mechanic in the DPW. (See Ex. 51) In January of 2002, Complainant underwent heart surgery to repair his aorta after suffering a dissecting, rear-ruptured aneurysm. (Ex. 1, 3, 4) Beginning sometime in January 2002, Complainant began a medical leave of absence from his mechanic's position for reasons related to his heart condition and surgery. (Id.) He remained on a medical leave until October of 2002.

4. In a letter dated June 17, 2002, Complainant's primary care physician, Dr. John Whyman, noted that as a result of his aortic aneurysm and to prevent further stress on his aorta, Complainant had a medical restriction that would prohibit him from working in a job that required him to lift more than 25 lbs. (Ex. 1) By a letter dated June 18, 2002, Dr. Whyman stated that Complainant was "permanently disabled from performing his current job as a result of his aortic surgery." (Ex. 2) On June 28, 2002, Dr. Whyman certified that Complainant had "suffered a dissecting, near-ruptured aortic aneurysm, requiring placement of a dacron graft and aortic valve replacement," that he could "only withstand mild stress, and that his condition was chronic and expected to last indefinitely. (Ex. 4)

5. Lori Burke is the City's former Health and Safety Officer and Worker's Compensation Manager. Burke is a nurse with a Bachelor's degree in nursing from Northeastern University. She has a Master's Degree in Public Health from Boston University and is a Certified Occupational Health Nurse Specialist. Burke was involved in all aspects of safety on the job and in decisions to grant medical leaves and accommodations to disabled employees. She made recommendations based on medical information from employee's physicians and ordered fitness for duty exams, if she believed them to be necessary. Burke managed employee's FMLA leaves and worked on accommodation requests with Delores Hamilton, Respondent's former Director of Human Resources. Burke testified that she works with injured or disabled employees and their physicians to assist them in returning to work and facilitating reasonable accommodations. She also consulted with the DPW Commissioner and employees' supervisors on accommodation issues.

6. Burke testified that in 2002 she assisted Complainant in securing FMLA leave which was approved in July and with his return to work in the Fall of 2002, following his open heart surgery. Burke contacted Complainant's treating physician, Dr. Whyman, to determine if there were reasonable accommodations that would allow Complainant to return to work at that time, and asked if Complainant was able to perform oil changes, change tires, and drive a truck to pick up parts weighing under 25 lbs. She also inquired if Complainant might be able to work restricted hours. (Ex. 6) Dr. Whyman responded by letter dated August 22, 2002, that Complainant would be able to perform these functions without restrictions on his hours. (Ex. 7) Burke thereafter contacted Dr. Whyman to discuss Complainant's work restrictions in further detail.

7. In October of 2002 Complainant's Union and Respondent entered into an agreement that allowed Complainant to return to his mechanic's position on modified duty with medical restrictions. (Ex. 9) His duties were oil changes, tire changes, obtaining parts, and other duties within his 25 lb. lifting restriction. (Testimony of Complainant, Burke, Hamilton, Mahan) Complainant testified that he mostly did oil changes all day. According to Burke, Complainant's restrictions were in part to limit the amount of stress on his damaged aorta. Burke, HR Director Hamilton, and the DPU Fleet Superintendent Ron Mahan, all testified that Complainant was unable to perform the essential functions of the mechanic's position as outlined in the job description, but that he was, nevertheless, granted accommodations to allow him to return to work. The agreement facilitating Complainant's return provided that his modified work duties would be temporary. In February of 2004, Complainant was given clearance to resume duties up to 40 lbs. (Ex. 16) Respondent continued to accommodate Complainant's disability and he performed modified duties on a permanent basis through March of 2008.

8. Sometime around March of 2008, Complainant was seen by a cardiologist, Dr. Shrivastava, for a tear in his aorta and a heart valve malfunction. (Ex. 13) Dr. Shrivastava imposed the following medical restrictions: no lifting of anything weighing more than 20 lbs., no heavy pushing, pulling or heavy exertion. (Id.) In June of 2008, those restrictions were further modified by Dr. Shrivastava to include no “prolonged standing, bending...lifting of any weight more than 10 lbs. or any moderate or heavy physical exertion.” (Ex. 14) Complainant applied for and was granted FMLA leave in July of 2008, retroactive to June. Dr. Shrivastava wrote as part of a Complainant’s Certification for FMLA leave, that his “current symptoms due to heart condition exclude possibility of working in current job.” (Ex. 17) As part of that same FMLA leave request in June of 2008, he diagnosed Complainant with: 1) severe mitral regurgitation, 2) frequent supraventricular tachycardia with palpitations, and 3) chronic thoraco-abdominal aortic dissection. (Ex. 17)

9. Burke explained the diagnoses and the symptoms of Complainant’s conditions and testified that the chronic thoraco-abdominal aortic dissection concerned her the most, because the wall of Complainant’s aorta is severely weakened and bulging. This can result in rupture at any time due to undue stress. She testified that if this were to occur, all blood flowing through the heart empties into the cavity of the body, and death occurs within minutes. According to Burke, because Complainant’s aortic dissection was chronic and not repaired and there was an unpredictable risk of rupture, it was much more difficult to identify an accommodation that would allow him to continue working, particularly in light of the significant new restrictions imposed by his cardiologist.

10. After receiving Dr. Shrivastava's diagnosis, in June of 2008, Burke requested that Complainant also be examined and evaluated by the City's physician, Dr. Hashimoto of Health at Work. (Ex. 19) Dr. Hashimoto concurred with Dr. Shrivastava's diagnosis and prognosis and recommended similar physical limitations of "no lifting over 10 pounds, no moderate or heavy exertion, avoid[ing] prolonged standing, bending, heavy pushing, and pulling." (Ex. 20)

11. In September 2008, Complainant underwent surgery to replace a heart valve and to repair his aorta. He was hospitalized from September 18 -26, 2008 for mitral valve replacement and readmitted from September 29 to October 8, 2008 for treatment of complications. (Ex. 25) Burke testified that Complainant's FMLA leave was extended after he had exhausted 12 weeks of leave. In October 2008, Complainant's cardiologist discussed a number of post-surgical complications and recommended that Complainant not return to work until his condition was reassessed by his physicians in December of 2008 after he had fully recovered from surgery. (Id.)

12. In a letter to Complainant in October 2008, Dr. Shrivastava noted that he and another cardiologist, Dr. Rizzo were concerned about the stress Complainant's current job duties, even as modified, placed on the aortic dissection and the risk of rupture of the aorta. The doctors suggested Complainant discuss with his employer a different job or further modifying his current job. (Ex. 24) In November of 2008, Dr. Shrivastava restated that due to a tear in the lining of the aorta, two artificial heart valves and high blood pressure, Complainant remained under the earlier prescribed restrictions. (Ex. 26)

13. In late 2008 Complainant contacted Burke to discuss his return to work in his mechanic's position . Although Complainant testified that he and Burke had no substantive discussions regarding how he might return to work in his mechanic's position, I do not credit this

testimony. Burke testified that she met with Complainant on a number of occasions in the late Fall of 2008 and the Spring of 2009 to discuss possible reasonable accommodations. They discussed Complainant's medical situation and how it impacted the City's ability to identify reasonable accommodations. Burke was unable to identify any reasonable accommodations that would allow Complainant to safely perform the essential functions of the modified mechanic's position. She told Complainant that she did not believe he could return to the job he had been doing even with accommodations due to the severity of the restrictions placed on him by his physicians. She discussed the seriousness and volatility of his condition, but Complainant insisted he was ok and could continue to do the work he had been doing. Burke testified credibly these discussions led her to believe that Complainant did not fully comprehend the import and severity of his diagnosis or was choosing to ignore it. This comports with my observations of Complainant's level of understanding of his medical condition.

14. Both Burke and Hamilton testified that they met regularly during the Fall of 2008 and in 2009 to discuss the possibility of Complainant returning to work. They explored whether there were potential reasonable accommodations that could be made for Complainant to be able to perform the modified mechanic's position. Complainant sought the assistance of his Union to return to work and communicated with Douglas Bartley, the Union President. In January of 2009, the attorney for Complainant's union sent a letter to Hamilton requesting a meeting with the City to explore Complainant's return to work. (Ex. 29) Hamilton testified that in early 2009, she began a series of conversations with Douglas Bartley, the Union President and the Union counsel, concerning the possibility of Complainant returning to work. Bartley confirmed that he had frequent discussions with Hamilton in early 2009 on the subject of Complainant returning to work. Hamilton conveyed Respondent's position that Complainant was unable to perform the

essential functions of any position in the garage given his current restrictions, since all of these positions entailed moderate physical exertion and prolonged standing, stooping, bending and pushing and pulling to some degree.

15. Complainant testified that he could continue working on the “grease rack” performing oil changes and stay within his 10 lb. lifting restriction. He testified he could seek assistance from other employees if he needed to change a tire or lift heavier items, and argues that he could have been permitted to sit down or take breaks as needed.

16. In contrast, Ron Mahan, the DPW Fleet Manager, described many of the duties of the mechanic’s position including oil changes and stated that the job frequently required lifting of items weighing more than 10 lbs. and involved physical exertion and strength beyond Complainant’s restrictions. He stated that in 2008 Complainant was requesting assistance to perform his modified job duties and he frequently had to assign another mechanic to work with Complainant in his modified mechanic’s position when a job involved parts weighing more than 25 lbs. In his view, Complainant was not performing the essential functions of the modified mechanics position prior to 2008. He further testified that given the tasks involved, the only safe way to accommodate Complainant in a further modified mechanic’s position would be to hire a full time assistant for him and that this was not reasonable. He testified that putting two men on a one-man job all the time was not feasible and would seriously decrease productivity. Mahan, who had supervised Complainant since at least 2002, supervised eight mechanics, and four other employees assigned to the DPW fleet of some six hundred vehicles and construction equipment. He helped create and modify the mechanic’s job description.

17. Mahan also testified that given the severe restrictions imposed on Complainant in 2008, if he remained working in the garage he would pose a danger to himself and others. Mahan testified that as Complainant's health deteriorated, he also began to have performance issues on the job. He described a number of mistakes Complainant made that compromised safety. According to Mahan, Complainant was not on top of things and believed the incidents could likely have been related to Complainant's deteriorating health. He also fielded complaints from other employees who were nervous that safety was being compromised by Complainant's errors.

18. Bartley testified that after his discussions with Hamilton, it was apparent that Complainant would not be returned to work in a modified mechanic's position. He thereafter began to pursue the possibility that Complainant could return to work in some other bargaining unit position. In a discussion with Burke and Complainant in late 2008, Bartley had suggested that Respondent might offer Complainant a position as a building cleaner, a member of the Village Crew, a driver for the sweeper crew or other motor equipment operator role. Bartley acknowledged that all positions within the bargaining unit have some significant, integral laboring function. Burke concluded that because of his severe medical restrictions and the risk of an aortic aneurysm, Complainant was not qualified for any position in the City that involved laboring functions. She testified that in her experience, she had never placed anyone with such severe physical restrictions in any position in the City, including any light duty position, with or without reasonable accommodations.

19. On January 13, 2009, Hamilton sent an email to Bartley and the Union counsel soliciting suggestions for any other vacant bargaining unit positions for which Complainant was qualified with or without accommodations. (Ex. 30) Her email further stated that Complainant's

“restrictions are quite limiting and permanent,” and explained the Complainant “ultimately agreed that he couldn’t do anything in the garage.” (Id.) The Union responded by email dated February 9, 2009 suggesting the following positions: 1) Heavy Motor Equipment Operator; 2) Village Crew; 3) Mechanic performing oil changes and similar light activity; and 4) Cleaner in the Elliot of Crafts Street garages. (Ex. 32)

20. The Heavy Motor Equipment Operators are responsible for the safe and efficient operation of medium and heavy duty motor equipment and use a variety of “unskilled labor’s tools.” The job description for the position states requirements of standing, walking, sitting, climbing, balancing, stooping, kneeling, crouching, and or crawling for 66% of each workday, with frequent lifting of up to 60 lbs. and occasionally lifting up to 100 lbs. (Ex. 53) An HMEO must have the ability to perform strenuous physical work over a period of time and to lift, carry, and place heavy objects often under adverse weather conditions. (Id.) Bartley testified that HMEOs would be required to shovel snow as part of snow and ice removal operations. While Bartley suggested that Complainant be permitted to just drive a truck as a reasonable accommodation, and not be required to perform any of the attendant laboring functions, Hamilton testified that there is no position in the City where a Union member can just drive a truck. Both Hamilton and Burke testified that the majority of the HMEO functions would far exceed Complainant’s physical restrictions and they could not identify reasonable accommodations that would allow Complainant to perform the essential functions of the job. Bartley testified that in his view, Complainant could perform the driving function of this position but be exempt from any of the attendant laboring functions. I credit the testimony of Hamilton and Burke that the position involves a multiplicity of essential laboring functions that cannot be reasonably waived or reassigned.

21. Complainant was also informed that in order to be qualified for an HMEO position he would require a commercial driver's license and a Department of Transportation medical waiver card because of his heart condition. (Ex. 36) Burke informed Complainant that he had to seek approval for the medical waiver from his cardiologist, and the City's physician concurred with this request. Complainant did not pass the visual acuity exam and sought a medical waiver from his primary care physician rather than his cardiologist. Respondent deemed this unacceptable. (Exs. 36, 40, 41, 42) Burke testified that even if Complainant had been able to obtain a medical waiver from his cardiologist, he would not have been qualified for the HMEO position due to the severity of his physical restrictions.

22. The Village Crew position was frequently given to bargaining unit employees who required a light duty assignment. The primary function of this position was traveling throughout the City's various squares to pick up trash, plant flowers, mow, landscape, and maintain sand barrels in the winter. Complainant asserted that he could have performed these functions taking breaks when necessary and with the help of other Village Crew members. However, even though Burke agreed to explore this option, both she and Hamilton were unable to identify any reasonable accommodation that would allow Complainant to perform the essential functions of the Village Crew position, and agreed that it was not safe for him to work in such a labor intensive position with his restrictions. Moreover, there was no Village Crew position available at the time Complainant sought to return to work in 2008 and 2009.

23. Bartley testified that the building cleaner position is not a formal bargaining unit position but is reserved as a light duty assignment. The general job function is to clean and maintain the garages and engage in the duties of mopping floors, stocking and cleaning the bathrooms, emptying the trash and possibly waxing floors. According to Bartley, certain

bargaining unit members had worked as building cleaners due to medical issues, one for as long as 6-8 years. At the time, there was only one building cleaner position in the Union and it was not vacant. Dr. Shrivastava opined that Complainant could perform this function with frequent breaks so that he is not continuously mopping the floor or on his feet.¹ Notwithstanding, Burke was concerned that Complainant's restrictions would prohibit him from mopping floors and emptying heavy trash cans, lifting buckets, cleaning bathrooms and performing a host of other laboring functions associated with this job.

24. Respondent had already determined and Complainant had acknowledged that he was no longer capable of performing the oil change functions of the mechanic's job due to his very limiting restrictions. Hamilton testified that the City and the Union continued their conversations exploring the possibility of Complainant returning to work, but the City was unable to identify any vacant positions for which Complainant was qualified, with or without an accommodation. The primary responsibilities of all laborer positions in the City, including the building cleaner position, require "performing physical labor, and ensuring the safe and efficient operation of light trucks, tools, and equipment for work projects." The duties of a laborer position include physical labor such as hauling materials, shoveling dirt, gravel and other materials, operating tools and equipment including a jack hammer, landscaping, such as mowing and planting, and participating in snow removal. (Ex. 52) Laborers are required to "stand, walk, use hands, and reach with hands and arms" 66% of the work day, and must be able to "climb, balance, stoop, kneel, crouch and crawl 33% of each workday. (Id.) Burke expressed concern that Complainant was unable to perform these functions with his limitations.

¹ Bartley testified that there is no position with the bargaining unit that is dedicated solely to mopping, and that other tasks associated with mopping including filling, lifting and pushing and pulling a heavy mop bucket would fall well outside Complainant's restrictions, as mop buckets weigh about 40 lbs.

25. Complainant also sought to be placed in the position of assistant storekeeper, a position that was held by another disabled employee who had cancer and was undergoing chemotherapy. He was placed in this position as an accommodation to his disability. This employee did not have the physical restrictions imposed on Complainant and one of the functions of his job was loading and unloading heavy equipment and bringing equipment from the utilities garage to various job sites throughout the City. He also assisted with laboring tasks such as landscaping and snow removal. There was no vacant assistant storekeeper position available at the time Complainant sought to return to work, but the union suggested the other employee be removed from this position so that it could be given to Complainant. Respondent asserted even if the position had been available, Complainant was not qualified to perform the essential functions because of the severity of his restrictions.

26. Hamilton informed the Union by letter dated July 15, 2009, that the City's Occupational Health Physician determined that Complainant was unable to perform any of the vacant positions safely. (Ex. 44) She testified that there were also grave concerns about Complainant's elevated blood pressure at the time he was attempting to return to work in the summer of 2009. (Id. Ex. 36) The Union's attorney responded by letter that it disagreed that Complainant was unable to perform one of the several positions it suggested with an accommodation and suggested that the City remove the employee assigned to light duty in the assistant storekeeper position upon the belief that this employee no longer required this accommodation. For reasons stated earlier Respondent declined to exercise this option.

27. In August 2009, the Respondent sent Complainant a letter that it would be conducting a Civil Service Hearing to address his employment status. (Ex. H) By letter dated August 29, 2009, Respondent terminated Complainant's employment with the City due to his

inability to continue to perform his job as mechanic because of his medical restrictions. The letter also noted that despite efforts to explore alternate positions, Complainant's medical restrictions would not allow him to perform any position within the Department of Public Works.

28. Following his termination from the City, Complainant received unemployment compensation in 2009 and 2010. He is currently retired from the City and receives pension payments from the City of \$900 per month which began in 2011. Complainant has not been employed since August 2009 and has not sought other employment. Complainant claimed that he suffered emotional distress as a result of his termination and has been under great financial stress and had to sell his home. He testified that he sold his home at market value in 2011 and moved to a more affordable living situation. (Ex. 55) He remains on the City's health plan and receives medical benefits.

III. CONCLUSIONS OF LAW

General Laws c. 151B, §4(16) makes it an unlawful practice for an employer to dismiss from employment or otherwise discriminate on the basis of handicap against an employee who is a qualified handicapped individual. The statute prohibits discrimination against persons with disabilities who are capable of performing the essential functions of the job with or without an accommodation and requires employers to provide reasonable accommodation to such disabled employees unless they can demonstrate that the accommodation sought would impose an undue hardship to the employer's business.

To establish a prima facie case of disability discrimination based on failure to provide a reasonable accommodation, Complainant must prove by a preponderance of the evidence that he is: (1) a "qualified handicapped person," i.e., has a physical or impairment which substantially

limits one or more major life activities, has a record of such impairment, or was regarded by Respondent as impaired; and (2) that he is capable of performing the essential functions of the job with or without a reasonable accommodation. See *Dahill v. Police Dept of Boston*, 434 Mass. 233 (2001); *Ocean Spray Cranberries, Inc. v. Mass. Comm'n Against discrimination*, 441 Mass. 632 (2004); Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap - Chapter 151B, 20 MDLR Appendix (1998) ("MCAD Handicap Guidelines") at p. 2. Assuming that Complainant establishes these elements, Respondent's burden is to demonstrate that accommodations sought are not reasonable, i.e. would create an undue burden on Respondent's operations and business.

There is no dispute in this case that Complainant is disabled within the meaning of the statute. He suffers from heart disease, experienced an aortic rupture which required a surgical graft in 2002, has a chronic and permanent aortic aneurysm, underwent surgery for aortic valve replacement in 2008, has high blood pressure, and has severe restrictions on his ability to stand, bend, push, pull, and perform activities requiring even moderate physical exertion.

Complainant was granted an extended leave of absence for nine months from his job as a mechanic with the City's DPW in 2002, for repair and recuperation of a ruptured aortic aneurysm. Complainant's doctor at the time described his condition as chronic and expected to last indefinitely and stated he could only withstand mild stress. Notwithstanding Complainant's inability to perform many of the essential functions of the mechanics position, Respondent granted him an accommodation to allow him to return to work. After a nine month medical leave, Complainant returned to work as a mechanic in a modified position where he performed almost exclusively oil changes in order to remain within his then 25 pound lifting restriction. The modified mechanic's position was a reasonable accommodation to the limitations of his

disability and was arranged with the assistance of Burke, the City's Health and Safety Officer. The decision to accommodate his disability meant that Respondent had to provide assistance to Complainant when necessary to perform functions prohibited by his restrictions and it did so for six years.

Complainant performed the modified mechanic's position from 2002 until the Spring of 2008 when his condition deteriorated and his restrictions became more onerous. In March of 2008 his lifting restriction was reduced to 20 lbs., and in June of 2008, a 10 lb. lifting restriction was imposed by his cardiac surgeon, in addition to a proscription on any moderate physical exertion, including any prolonged standing and bending. Complainant sought FMLA leave in July of 2008 and his leave was granted retroactive to June when he actually left work. His symptoms at that time precluded him from continuing to work in the modified mechanics job. DPW Fleet Manager Mahan, Burke, the City's Health and Safety Officer, and HR Director Hamilton all testified that given his more limiting restrictions Complainant could no longer even perform the modified mechanics job. Complainant had surgery and remained out of work through the autumn and winter of 2008 and into 2009.

I credit Respondent's assertion that when Complainant sought to return to work in 2009 after his second extended leave of absence, he could no longer perform the essential functions of the modified mechanic's position he had been performing since 2002. Respondent's position is consistent with the severe limitations imposed on Complainant by his cardiologist and the opinion of other medical experts. Even Complainant was reluctantly compelled to admit at some point that he could no longer perform that job, although at hearing he asserted that he could.

The disputed issues are whether in 2008 and 2009 Complainant was a qualified handicapped individual capable of performing the essential functions of his modified mechanic's

position or of any other position within his bargaining unit that he identified as light duty, with or without a reasonable accommodation. The burden of proof rests with the employee to show that there is some possibility that a reasonable accommodation could be made to enable him to perform the essential functions of his job. *Godfrey v. Globe Newspaper, Inc.*, 457 Mass. 113, 119-120 (2010). Absent such proof, the employee is not a qualified handicapped person and is therefore, not entitled to relief. *Cox v. New England Tel. & Tel.*, 414 Mass. 375, 386 (1993).

There is also a question of whether Respondent had an obligation to transfer Complainant to any number of other positions he identified as a reasonable accommodation, and if so, whether accommodations to Complainant's severe physical limitations were feasible in any of those positions given the type of physical labor required. Complainant also asserts that Respondent did not engage in sufficient efforts to determine what if any accommodations might be feasible for him, including permanent light duty in his mechanic's position or in any other so- called light duty positions.

The duty to provide a reasonable accommodation requires an employer to participate in an interactive process with a disabled employee who requests an accommodation. MCAD Handicap Guidelines at VII; *Mammone v. President & Fellows of Harvard College*, 446 Mass. 657, 670 n.25 (2006). *Shedlock v. Department of Correction*, 442 Mass. 844, 856 n. 8 (2004); *Ocean Spray Cranberries, Inc. v. MCAD*, 441 Mass. 632, 644 (2004). The interactive process requires the employer to engage in a direct, open, and meaningful communication with the employee, which is designed to identify the precise limitations associated with the employee's disability and the potential adjustments to the work environment that could overcome the employee's limitations. See *MBTA v. MCAD*, 450 Mass 327, 342 (2008); *Daly v Codman &*

Shurtleff, Inc., 32 MDLR 18, 26 (2010); *Mazeikus v. Northwest Airlines*, 22 MDLR 63, 68-69 (2000).

I conclude that Respondent met its obligation to explore the feasibility of reasonable accommodations that might have allowed Complainant to return to work. Respondent's agents Burke and Hamilton had significant discussions with Complainant's union representative over a lengthy period of time in late 2008 and 2009, seeking to identify positions Complainant might be able to perform. Burke also discussed the matter with Complainant on a number of occasions. Respondent had previously accommodated Complainant's limitations in 2002 by modifying the mechanics position and allowing him to return to work despite lifting restrictions and other limitations. I found both Burke and Hamilton's testimony to be sincere and credible, and am persuaded that they made genuine efforts to determine what if any accommodations might be feasible for Complainant. They continued to explore possibilities for Complainant for several months and sought independent medical opinions in addition to his cardiologist's. In 2008 and 2009, their efforts to return Complainant to work were stymied by the severity of Complainant's condition and the additional physical limitations and restrictions placed on his activities. The fact that all the bargaining unit positions within the DPW require at the very least moderate exertion, including repeated standing and bending, pushing, pulling, and lifting over 10 pounds was also a fundamental consideration. Furthermore, Respondent had granted Complainant two lengthy medical leaves of absence in 2002 and 2008 for surgery and recuperation therefrom and held his position open during those times. This and the fashioning of a modified mechanic's position in 2002 demonstrate that Respondent was clearly not adverse to granting accommodations for medical conditions when feasible.

Respondent asserts that the accommodations that Complainant sought in 2008 and 2009 were not reasonable because they would have required a full time person to assist him in the modified mechanics position or because the other jobs he identified all had significant and essential manual labor requirements involving moderate to heavy exertion, lifting, standing and bending. Respondent also asserted that the severity of Complainant's heart condition and his significant limitations posed safety risks to himself and other employees. Mahan testified that prior to his leave, Complainant had made some significant errors on the job that impacted safety and that his co-workers raised this issue. There was a substantial concern that allowing Complainant to return to a strenuous and physically demanding job with his limitations would cause further harm to himself and possibly others. Respondent is allowed to consider such safety risks and may inquire of an employee regarding his limitations, when "an employee wishes to return to work after an injury or illness and the employer wants to determine the employee's ability to perform the essential functions of the job without risk of harm to the employee or others." MCAD Handicap Guidelines at VI B 1(c); IX B 3. In this case Respondent's contention that it could not reasonably accommodate Complainant because he could not perform the essential functions of any bargaining unit DPW positions, even if modified, and for reasons related to his and other employees' safety, is not based on mere speculation, but on the firm opinions of a number of medical experts, including Burke, who is a Certified Occupational Health Nurse Specialist and highly qualified in assessing accommodations.

Complainant was unable to provide sufficient medical or other evidence that he was a qualified handicapped individual. I conclude that given the severity of his disability and his limitations, Complainant was not capable of performing the essential functions of the modified mechanics job. Respondent had no obligation to further modify the mechanics job, and there

were no other vacant positions identified that might be deemed lighter duty that would not have required further modification by Respondent to meet Complainant's restrictions. Respondent provided sufficient evidence that alternative positions were not available, but that even if they were, Complainant was unable to perform the essential functions of the Heavy Equipment Motor Operator, Assistant Storekeeper position, cleaner, or other bargaining unit laborer jobs within the DPW, given his serious condition and severely limiting restrictions.

An accommodation is not reasonable if it imposes "undue financial and administrative burdens" on the employer. *Cox v. New England Telephone & Telegraph Co.* 414 Mass. 375, 383 (1993) quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979), or requires a "fundamental alteration in the nature of [the] program." *Id.* See also *Russell v. Cooley Dickinson Hospital, Inc.*, 437 Mass. at 443, 454 (2002) (reasonable accommodation does not require employer to "fashion a new position"); *Beal v. Selectmen of Hingham*, 419 Mass. 535, 541-542 (1995) (employer may refuse to accommodate handicap that necessitates a substantial modification to standards of a job); *Cox v. New England Telephone & Telegraph Co.*, 414 Mass. 374 (1993) (reasonable accommodation does not require employer to waive or excuse an employee's inability to perform an essential job function) *Tompson v. Department of Mental Health*, 76 Mass. App. Ct. 586, 596 (2010) (reasonable accommodation does not extend to a fundamental redesign of job with shorter hours on an open-ended basis that effectively reallocates responsibilities to others); *Dziamba v. Warner and Stackpole*, 56 Mass. App. Ct. 397, 405-406 (2002) (reduction in work hours not legally required where granting part-time schedule would require that employer reallocate the employee's duties and make substantial changes in the job). Respondent successfully demonstrated that the accommodations Complainant sought were not reasonable, because they would require additional personnel be available to assist him

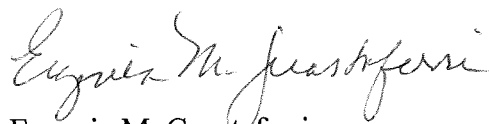
or would require Respondent to forego the essential functions of certain positions. Respondent had no obligation to fashion a new position for Complainant by removing many of the essential laboring functions of these jobs.

Given all of the above, I conclude that Complainant was not a qualified handicapped individual capable of performing the essential functions of the modified mechanics job or the other positions he identified. Respondent's failure to grant him a further permanent accommodation and the termination of his employment were not in violation of G.L. c. 151B.

IV. ORDER

This case is hereby dismissed. The decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 11th day of August, 2015.


Eugenia M. Guastaferrri
Hearing Officer